In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

JAMES M. LEAVER, JR.,
Petitioner,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE (a national banking corporation), and DONALD PARKER, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, FOOD MACHINERY CORPORATION (a corporation), SIGNODE STEEL STRAPPING COMPANY (a corporation), PARKER MACHINE WORKS, INC. (a corporation), JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY (a corporation),
Respondents.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.

OPINION AND JUDGMENTS BELOW.

The opinion and judgment of the Circuit Court of Appeals for the Ninth Circuit which modifies the judgment of the District Court against Leaver and dismisses the action for want of jurisdiction will be found in the record at pages 1572-1575; and the summary judgment of the District Court against Leaver is found in the record at page 1486.

For the sake of brevity we refer to the preceding petition for the following:

Jurisdiction.....(supra, page 8); and

Statement of the Case.....(supra, pages 2 to 8).

ASSIGNMENT OF ERRORS.

The Court erred in holding that it did not have jurisdiction of the first cause of action under the antitrust laws.

The Court erred in wholly failing to pass upon the second cause of action for infringement as distinguished from the first cause of action under the antitrust laws.

The Court erred in holding that the Court did not have jurisdiction of the second cause of action under the patent laws.

The Court erred in holding that the pleadings and affidavits showed that the action did not arise under the patent laws or the antitrust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court.

The Court erred in dismissing each cause of action for want of jurisdiction.

The Court erred in not holding that the intent and effect of respondents' unlawful retention of the special manufacturing facilities was to shut off production and distribution of wire binding machines and parts and cripple and destroy the ability of petitioner to obtain and execute contracts involving interstate commerce and create a monopoly.

The Court erred in not holding that the intent and effect of respondents Signode's and Wire Tie's unlawful seizure of all existing machines and parts was to shut off supply and cripple and destroy the ability of petitioner to sell and supply wire binding machines and parts in interstate commerce.

The Circuit Court erred in not following the decisions of this Honorable Court in interpreting and applying the provisions of the Sherman Act.

ARGUMENT.

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PLEADINGS AND AFFIDAVITS SHOWED THAT THE ACTION DID NOT ARISE UNDER THE PATENT LAWS OR THE ANTI-TRUST LAWS AND DID NOT REALLY AND SUBSTANTIALLY INVOLVE ANY DISPUTE OR CONTROVERSY WITHIN THE JURISDICTION OF THE DISTRICT COURT.

In dismissing the action and modifying the judgment entered by the District Court the Circuit Court of Appeals stated (R. 1572-1575):

> "The pleadings and affidavits showed that the action did not arise under the patent laws or the antitrust laws and did not really and substantially involve any dispute or controversy properly

within the jurisdiction of the District Court. Therefore, instead of entering judgment on the merits, the court should have dismissed the action for want of jurisdiction. Judicial Code, §37 (28 U. S. C. A. §80)."

"The action arose upon and involved the construction and interpretation of a contract which, among other things, granted a license for the manufacture and sale of machines embodying inventions for which patents had been issued or applied for. That, however, did not make it an action arising under the patent laws."

"The only controversy which this action really and substantially involved was a controversy as to who were Parker's and Evans' successors in interest. The gravamen of the complaint was that appellees and their codefendants had claimed and were claiming to be such successors and had exercised and were exercising rights which the contract had vested in Parker and Evans; whereas, according to the complaint, appellant had succeeded to and was entitled to exercise all of said rights."

Interstate commerce.

It can hardly be said that the allegations that the respondents entered into a conspiracy to restrain the competition of the petitioner in trade and commerce among the several states, and to deprive him of his business and to obtain that business for the respondents, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition. See *Addyston Pipe Co. v. United States,* 175 U. S. 211, 241, 242, 20 S. Ct. 96, 44 L. Ed. 136.

The quoted holding of the Circuit Court is in error for six reasons.

* * * * * * *

The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209.)
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209.)
>
> Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount

in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)"

The pertinent provisions of the Clayton Act involved are as follows:

"Section 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (U. S. C. A., Title 15, Sec. 14.)

Section 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or

tend to create a monopoly of any line of commerce. (U. S. C. A., Title 15, Sec. 18.)

Section 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *."

The first is that the Court failed to give effect to Section 1 of the Sherman Act. Under Section 1 the conspiracy and resulting restraint upon interstate commerce is sufficient. The complaint, as amended, pleads, and the evidence as may be deduced from the answers, affidavits, admissions, and interrogatories support the pleadings. The rule is succinctly stated:

> "If, by necessary operation of the conspiracy there is an actual restraint the statute is violated, the actual intent being immaterial."
>
> *Standard Sanitary Mfg. Co. v. United States,* 226 U.S. 20, 49;
>
> *Paramount Famous Corp. v. United States,* 282 U.S. 30, 49.

Admittedly (R. 35, 37, 38, 42, 146-156) the complaint, as amended pleads a violation of Section 1 by

conspiracy to restrict national automatic wire binding machine and parts business in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly in movements of such machinery.

The fact is,—the gravamen of Leaver's charge in the first cause of action is that the scheme in this case amounted to a vicious conspiracy to circumvent the Sherman Act by basing it upon a license of slight or no importance which was used only as a subterfuge.

The record clearly evidences that Signode (R. 291, 292, 279), Parker Machine Works, Inc. (R. 429), Food Machinery (R. 477), and Wire Tie (R. 218), collectively allege "exclusive sales rights" in interstate commerce which transcend any patent monopoly.

Wire Tie states (R. 218):

> "This defendant as the successor in interest of the exclusive sales rights for wire tying machines *and parts.*"

Signode states (R. 280):

> "George D. Parker owned the exclusive right to manufacture machines *and parts* under said contract."

The commerce here involved in *unpatented* repair and replacement parts is very substantial as the record shows. (R. 743-748.) All items showing "less 20%" being Signode's discriminatory discount. (R. 1199.)

Beyond any peradventure the *unpatented* repair and replacement parts constitute a substantial part of the monopoly exercised by the respondents' corporations.

In *Carbice Corporation v. American Patents Corporation,* 51 S. Ct. 334, 283 U. S. 27, the Court stated:

> "The limited monopoly to make, use and vend an article may not be 'expanded by limitations as to materials and supplies necessary to the operation of it'. *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502, 515. Compare *United Shoe Machinery Corp. v. United States,* 258 U. S. 451, 462; *United States v. General Electric Co.,* 272 U. S. 476, 492." (at page 31.)

In the instant case all the respondents support Wire Tie, in asserting *"exclusive sales rights for both machines and non-patented parts"*, a practice which this Court has repeatedly condemned. The patents under the 1922 agreement are not for parts and parts are not referred to in any manner whatsoever in said agreement.

The unpatented supplies and parts monopolized by respondents are merely used in the operation of the machines.

In *Standard Sanitary Mfg. v. United States,* 226 U. S. 20 at pages 33 and 34, the Court said:

> "Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it issued. Relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention. The present attempt is analogous to the use of a patent as an

instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law."

Patent monopoly.

In evidence of the world-wide scope of the monopoly attempted and exercised by respondents, the following patents are claimed by Wire Tie Machinery Company to have been purchased from the estate of George D. Parker, deceased:

Foreign Patents—13 (R. 975);
U. S. Patents—7 (R. 975);
U. S. Patent Application—1 (R. 977).

In *Standard Oil v. U. S.*, 283 U. S. 163, at page 174, the Supreme Court stated:

> "The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. New Departure Mfg. Co.*, 204 Fed. 107; *United States v. Motion Picture Patents Co.*, 225 Fed. 800, appeal dismissed, 247 U. S. 524. Compare *United States v. Kellogg Toasted Corn Flakes Co.*, 222 Fed. 725; *United States v. Eastman Kodak Co.*, 226 Fed. 62, appeal dismissed, 255 U. S. 578."

The Dun and Eldridge applications (now issued patents) under which Signode has for years repeatedly threatened to destroy the business of petitioner (R. 29, 250, 251, 688-695, 703-714) are the only other United States patents in existence relating to the type of Automatic Wire Binding Machines involved in this action, Signode owning and controlling the exclusive right to manufacture and sell the same for the entire

newspaper trade throughout the United States and to all users and trade in all the States which lie east of the Rocky Mountains.

Infringement.

The pleadings of the infringement cause of action allege no violation of the contract by reference alleged therein and asks no judgment upon that contract. The only purpose of its inclusion was as a possible basis upon which to predicate damages for infringement.

The cases cited by the Court are inapplicable.

In the case of *Wade v. Leander,* 165 U. S. 624, at page 628, the Court said:

> "We are unable to discover in this case that plaintiff specially set up and claimed, at the proper time and in the proper way, any right under the laws of the United States, or that any such right was denied him by the decision of the state courts."

In the case of *Albright v. Teas,* 106 U. S. 613 at page ....., the Court said:

> "The suit was brought to recover the consideration of this transfer, and was not based on the letters patent."

In the case of *Wilson v. Sanford,* 10 How. 99, 101 at page 102, the Court said:

> "* * * The object of the bill is to have this contract set aside and declared to be forfeited; * * *."

In the case of *Hartell v. Tilghman,* 99 U. S. 547 at page 552, the Court said:

> "* * * The object of the bill is to have this contract set aside and declared to be forfeited; * * *."

In the case of *Brown v. Shannon,* 60 U. S. at page 56, the Court said:

> "* * * Upon looking, however, carefully into the bill, we think it must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to, and not as one to protect the complainants in the exclusive enjoyment of a patent right."

In the case of *Marsh v. Nichols, Shepard & Co.,* 140 U. S. 344 at page 353, the Court said:

> "The bill was filed in the Circuit Court of Calhoun County for the specific performance by defendants below, * * *"

The case of *Dale Tile Manufacturing Co. v. Hyatt,* 125 U. S. 46, was a suit directly on a contract involving no infringement.

In the case of *Briggs v. United Shoe Machinery Company,* 239 Fed. Reporter, 48 at page 49, the Court said:

> "The bill shows that its dominant and ultimate object is to enforce payment of royalties reserved to the plaintiff by a contract * * *."

Restrictions.

Respondents allege *exclusive sales rights for both machines and parts,* as coming from the license agreement executed October 19, 1922, by and between Leaver, Parker and Evans. (R. 54-72.) Their contentions that the license to sell granted Parker therein is exclusive is a subterfuge. Parker was restricted in several essential respects. Illustrating that the license is clearly and definitely restricted in such man-

ner as to prevent Parker monopolizing and restraining interstate commerce attention is called to some of the restrictions:

> "16. It is further understood and agreed that licenses may be granted to others for the manufacture and sale of the herein licensed inventions under *terms and conditions which may be mutually agreed to by and between the parties hereto.*" (R. 67.)
>
> "23. It is further understood and agreed between the parties hereto that the selling price of said machines is to be established and modified, from time to time, *mutually by the parties hereto,* as trade conditions may render advisable and necessary." (R. 70.)
>
> "7. It is understood and agreed to by and between the parties hereto, that this Contract Agreement or the interest of either party thereto and therein, *shall not be assigned, transferred, or set over* by either party hereto *without the consent of the other parties* being first asked and obtained in writing, so to do." (R. 60, 61.) (Italics ours.)

Signode's contention that the purchase of machines was without restriction is contrary to the fact in the record, quoting from the Signode license (R. 755):

> "1. Paragraph 3 of said agreement is hereby amended to read as follows: Signode shall have the exclusive right to sell and/or distribute machines and parts throughout all of the United States *other than* the states of California, Texas, Arizona, New Mexico, Nevada, Oregon, Washington, Montana, Utah and Idaho, together with the

exclusive right to sell and/or distribute machines and parts (631) in and throughout the states of California, Texas, Arizona, New Mexico, Nevada, Oregon, Washington, Montana, Utah and Idaho, to the *newspaper and publishing trade only.*"

It is therefore clear from the record that Signode had no right to sell machines in the State of California *other than to the newspaper and publishing trade.* The machines sued upon are not used by that trade.

As the restriction was legal Signode is liable for the machines sold outside the scope of the license because it has used the invention *without license* to do so. (*General Talking Pictures Corp. v. Western Electric Co.,* 59 S. Ct. 355, 305 U. S. 675.)

CONCLUSION.

In conclusion it is respectfully submitted that this case is one particularly appropriate for review by this Court, since:

(a) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in automatic wire binding machines and *unpatented repair and replacement parts.*

(b) As a result of respondents' conspiracy and acts in furtherance thereof there was a direct restraint upon interstate commerce, whether that commerce be in trade in *patented* automatic machines or *unpatented* repair and replacement parts, because such business substantially involves interstate commerce.

(c) The present decision is in conflict with the uniform decisions of this Court.

It is submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit here involved has incorrectly decided all issues presented in the case and that said decision should be reversed. Respondent therefore prays that said decision be reversed and for such other and further relief as may seem proper in the premises.

Dated, Washington, D. C.,
November 24, 1941.

Respectfully submitted,
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